In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-354

LOUIS VERIVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on four counts of using the mails and other interstate facilities in furtherance of a scheme to defraud, and of conspiracy to do so, in violation of 18 U.S.C. 371, 1341, 1343, and 2314. Petitioner was sentenced to concurrent terms of four years' imprisonment on the conspiracy and one of the substantive counts, and to a consecutive term of four years' probation on a second substantive count.[1] The court of appeals affirmed (Pet. App. A). Petitioner's only contention here is that since one of the named co-conspirators had been acquitted of the conspiracy charge in an earlier trial, petitioner's prosecution on that charge was barred by *res judicata*.

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[1]The third substantive count was dismissed prior to sentencing.

Petitioner's convictions rested upon his participation in a fraudulent scheme that he and others conducted in the name of Church of Christ Manors (hereinafter "CCM"), an organization ostensibly formed to assist Church of Christ congregations in obtaining government construction loans. CCM held itself out as a financial broker or lending institution and sold "commitment letters" to the congregations; those letters were worthless, as CCM had no assets or government loan funds to back up such commitments. Petitioner took part in three separate fraudulent commitment transactions. In two of those transactions, the defrauded victim was referred to petitioner by George Stanaszek.

Stanaszek and twelve others had been tried together in an earlier trial; nine of those defendants, including Stanaszek, were acquitted on all counts; the remaining four were convicted of conspiracy and one or more substantive counts.[2]

The conspiracy count on which petitioner was convicted was based upon overt acts that included petitioner's dealings with Stanaszek. Petitioner contends that since Stanaszek had been acquitted on the same conspiracy count, the government was barred from prosecuting petitioner on that count.

We note at the outset that petitioner attacks only his conviction for conspiracy and that his sentence on the conspiracy count runs concurrently with that on one of the substantive counts. Accordingly, this would not be an appropriate case for discretionary review. See *Barnes* v. *United States*, 412 U.S. 837, 848 and n. 16.

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[2]Three other co-defendants pled guilty prior to trial, an additional co-defendant was murdered before trial, and the charges against one co-defendant were dismissed because of his ill health.

In any event, petitioner's prosecution for conspiracy was not barred by Stanaszek's acquittal. The doctrines of *res judicata* and collateral estoppel do not bar the government from bringing a conspiracy prosecution against a defendant after the acquittal of one of his alleged co-conspirators. Those doctrines have been applied in criminal cases only within the confines of the Fifth Amendment's guarantee against double jeopardy. Cf. *Ashe* v. *Swenson*, 397 U.S. 436. Petitioner was not prosecuted in the earlier trial and therefore he has no basis for a claim of *res judicata* or collateral estoppel.[3]

Moreover, the conspiracy count on which petitioner was convicted described his participation in overt acts with several co-defendants, not only with Stanaszek. Several of those listed as petitioner's co-conspirators had been convicted in the earlier trial. Thus this is not a case like *Herman* v. *United States*, 289 F. 2d 362 (C.A. 5), upon which petitioner relies, where the only described overt act was committed solely by acquitted co-defendants.[4] Accordingly, an earlier find-

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[3]*Sealfon* v. *United States*, 332 U.S. 575, and *Williams* v. *United States*, 179 F.2d 644 (C.A. 5), upon which petitioner relies, involved second prosecutions of the same defendants.

[4]In *Herman*, the court reversed the defendant's conspiracy conviction because the named co-conspirators who were responsible for the overt act were acquitted in the same trial. We believe that result is inconsistent with this Court's determination in *Hamling* v. *United States*, No. 73-507, decided June 24, 1974 (slip op. 11), that consistency in verdicts is not required.

ing that, for example, Stanaszek had lacked the requisite conspiratorial intent would not bar petitioner's prosecution even if the principles of collateral estoppel were otherwise applicable. See, *e.g., United States* v. *Bass,* 472 F.2d 207, 213 (C.A. 8), certiorari denied *sub nom. Selb Mfg. Co.* v. *United States,* 412 U.S. 928; *Kamanosuke Yuge* v. *United States,* 127 F.2d 683, 689 (C.A. 9), certiorari denied *sub nom. Mateus* v. *United States,* 317 U.S. 618.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[5] *Leyvas* v. *United States,* 264 F.2d 272 (C.A. 9), upon which petitioner further relies, is not to the contrary; indeed, the court there disapproved the striking of evidence relating to acquitted co-conspirators (*id.* at 274).